SUPREME COURT, U. S.
Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-961

JOSEPH GENTILE and ERNEST LAPONZINA,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled case on the 22nd day of October, 1975, which affirmed judgments of conviction of the Eastern District Court of New York (Costantino, D.J.) based upon a finding of guilt by a jury.

Petitioner Gentile was convicted of two counts of offering and giving a $3,000.00 bribe to an I.R.S. Special Agent in connection with his income tax returns, in violation of 18 U.S.C. § 201(b).

Both petitioners were convicted of one count of offering and giving a $1,000.00 bribe to the I.R.S. Special Agent in connection with the income tax returns of petitioner La-

Ponzina in violation of 18 U.S.C. § 201(b) and of one count of conspiracy to do so in violation of 18 U.S.C. § 371.

Petitioner Gentile was sentenced to a concurrent straight four (4) year term of imprisonment on each count and $25,000.00 fine.

Petitioner LaPonzina received a concurrent six (6) month split term of confinement in a community treatment center and a period of probation thereafter.

Opinion Below

The judgments of conviction of the District Court were affirmed by the Circuit Court, whose opinion is included herein (Appendix "A", *infra,* p. 1a *id.*).

Jurisdiction

The judgment of the Circuit Court was entered on the 22nd day of October, 1975 (Appendix "A"). A petition for rehearing and rehearing *en banc* was denied by the Circuit Court on the 11th day of December, 1975 (Appendix "B" and "C", *infra,* pp. 21a, 22a *id.*).

Both petitioners remain at liberty pending certiorari by order of the Circuit Court (Appendix "D", *infra,* p. 23a *id.*).

No extension of time has been granted within which to file this petition. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule § 22(2).

Questions Presented

1. Did the trial judge err in admitting incriminatory statements of appellants, despite the fact that they were not advised of their rights as required by I.R.S. regulations?

2. Did the judge err in improperly invading the secrecy of the jury by submitting to them an unrequested exhibit while they were deliberating?

3. Did the trial judge err in declaring a mistrial as to petitioner LaPonzina when the prosecutor improperly anticipated petitioner Gentile's defense of entrapment in opening to the first jury, and as a result thereof was LaPonzina placed in double jeopardy by the second trial?

Statement of the Case

The case against the petitioner was made by an I.R.S. Special Agent armed with a body transmitter, who engaged the petitioners in recorded and guided conversations.

Although I.R.S. regulations expressly provided for a reading of a taxpayer's rights upon initial interview by a Special Agent, (Appendix "E" *infra*, p. 24a *id.*) Gentile was not advised that he could have a lawyer present and La Ponzina was not advised of his rights at all; and the agent admitted that he flouted the regulations.

Gentile repeatedly told the agent to "do your job" and "do your duty" in response to leading suggestions made by the agent. He so instructed the agent at least fifteen (15) to twenty (20) times. Eventually, after first telling Gentile that he wanted to help him and not recommend criminal prosecution, the agent, for the first time, brought up the subject of money to which Gentile acquiesced.

Thereafter, Gentile became loquacious and made incriminating statements as to other acts indicative of prior disposition.

Gentile contends that if he had been fully advised of his rights, he would not have talked about prior disposition and accordingly, his defense of entrapment would have prevailed.

Only Gentile could have used the defense of entrapment, since mostly all of the agent's conversations were with him.

He did so, but such defense was aborted by his subsequent loquaciousness in ignorance of his right to have his attorney present to advise him prior to answering the agent's loaded questions.

The agent then requested Gentile to introduce him to La Ponzina, stating that he was also checking La Ponzina's returns, although he had no case on him.

Gentile introduced the agent to La Ponzina and they talked.

La Ponzina did not have such a defense of entrapment inasmuch as the alleged bribe was not paid by him.

All that La Ponzina did was to have taped conversations with the agent who refused to advise him of his rights against self-incrimination.

Counsel requested the trial judge to charge the jury that they could consider that the petitioners might not have made any incriminating statements to the agent had they been properly advised of their rights (Appendix "F", *infra* p. 26a id.). However, he merely gave this terse and inadequate instruction:

> "You must treat this information like any other piece of evidence, that is, you must determine the weight to be given this testimony."

Initially, the prosecutor's opening statement before the first jury anticipated such a defense of entrapment by Gentile and pointed out the facts of Gentile's prior disposition.

Gentile's attorney moved for a mistrial. The judge ruled that the opening was improper and prejudicial. The judge asked counsel for La Ponzina if La Ponzina wished

to join in the motion, which La Ponzina's counsel refused, stating that he had no standing, inasmuch as the defense of entrapment was not available to him. Nevertheless, the judge granted the mistrial although he acknowledged that La Ponzina did not join in the motion—

> The Court: "I never said you joined in the motion. I said you participated in the discussion. If you read the opinion, I was very careful using the words."

La Ponzina's counsel participated to the extent of making one or two suggestions to the prosecutor, while Gentile's attorney argued the motion.

1) Mr. Klein: "Suppose he rests now and does not put any defense of entrapment in, you have a mistrial."

2) Mr. Klein: "Your main case is only what you are supposed to tell them."

3) Mr. Klein: "In view of the propensities shown by the transcript, he may have decided to avoid it. You brought it in now. He is either forced to go with it or sit still. If he does sit still, it is all prejudicial."

During their deliberations, the jurors asked to hear the one *tape* containing the $1,000.00 bribe *and* free golf lessons.

The only such tape was the tape of August 8, 1972. However, the judge gratuitously also played the tape of August 3, even though not requested by the jury. When counsel objected, he was commanded to "sit down". The judge failed to call for a bench conference as required in the Circuit. The combined effect of both tapes was prejudicial to petitioners, whereas the single tape of August 8th, standing by itself, is hardly

Statutes

18 U.S.C. 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. 201

(a) For the purpose of this section.

"public official" means Member of Congress, the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government or a juror; and

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to

give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in ivolation of his lawful duty, or

18 U.S.C. 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Constitutional Amendments

AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any crim-

inal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for defence.

Reasons For Granting Writ

The Circuit Court, in its opinion, thrice criticized the Trial Judge, in that:

1) He was vulnerable to the suggestions of and easily led and persuaded by defense counsel, even "to the precipice".

2) His charge to the jury concerning the failure and refusal of the special agent to advise petitioners of their rights, was inadequate, misleading and confusing and "would not have contributed greatly to (their) understanding had (they) been on the jury".

3) He created a problem by failing to follow the instructions in *United States* v. *Schor*, 418 F. 2d 26 (2 Cir. 1969) to consult with counsel to determine whether there was any disagreement as to whether the August 3rd tape should be submitted to the jury, and overlooking and ignoring the objections of defense counsel thereto and silencing defense counsel and unlawfully delegating the

exercise of his judicial discretion to the jury "and relied on letting the jury do the job he should have performed".

Nevertheless, the judgments of conviction were affirmed. Mere naked criticism, unaccompanied by relief to the petitioners who were the targets and victims of such criticized conduct by the trial judge, is merely pyrric and a denial of due process.

It seems incongruous that the petitioners who were directly affected by the criticized conduct of the trial judge received no relief therefrom, whereas future defendants will be the beneficial recipients of such criticism.

Query! How much judicial criticism is required before these petitioners are entitled to relief by reason thereof?

The atmosphere of the trial, under the criticized conduct of the trial judge, was so unfair as to have denied the petitioner of a fair trial and due process of law.

Petitioners were deprived of their constitutional right against self-incrimination and denied due process of law because of the failure to suppress their incriminatory statements, declarations and admissions because of the refusal and failure of the Special Agent to advise them of their rights, as required by I.R.S. regulations.

The interviews by the Special Agent were accusatory and the taxpayers had to be given their rights, the failure to do so, mandates the exclusion of their incriminatory statements.

The attention of this Court is respectfully invited to the recent case of *Beckwith* v. *United States*, Supreme Court 74-1243 in which certiorari was granted and which was argued before this Court on December 1, 1975.

It is generally held on the authority of *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), that where an agency of the Government does not observe the rules, regulations or procedures which it has established, the due process clause of the Fifth Amendment has been violated.

When the procedure prescribed by the regulation is not followed, evidence so obtained will be suppressed on the grounds that the due process clause of the Fifth Amendment has been violated. *United States* v. *Heffner*, 420 F. 2d 809 (4th Cir. 1969); *United States* v. *Leahey*, 434 F. 2d 7 (1st Cir. 1970); *United States* v. *Maciel*, 351 F. Supp. 817 (D.R.I. 1972).

In *Leahey*, it was held that it was the court and not the agency that was determining admissibility based on its interpretation of the Fifth Amendment and thereby rebutted the specious rationale the due process clause was not violated because administrative agencies may not dictate precondiitons for admissibility of evidence in federal trials.

The *Leahey* rule was adopted in *United States* v. *Brod*, 324 F. Supp. 800 (S.D. Tex. 1971). See also *United States* v. *Phifer*, 335 F. Supp. 724 (S.D. Tex. 1972), wherein the courts suppressed evidence obtained where the procedure outlined was not followed.

Inasmuch as the Second Circuit has not yet ruled on the effect of this particular regualtion of the Internal Revenue Service, we request the adoption of the *Leahey* rule, since the *Accardi* case is controlling.

The trial judge improperly invaded the secrecy of the jury after it had commenced deliberations and interfered therewith by gratuitously submitting additional matter to them, although *Not* requested by the jurors.

The discretion of the court to send material to the jury during its deliberation cannot come into play until such a request has first been made by the jury.

In *Easley* v. *United States*, 261 F. 2d 277 (Cir. 1958), the Court of Appeals held:

> "We think the *granting of the request* (that testimony of a prosecution witness be read back) was within the

district court's discretion and no abuse of that discretion is shown."

It is important to note that it was the granting of a *request* which was affirmed in *Easley*. Logically, therefore, the request must be made before it can be granted, and in the absence of a request, the judge is not free to send material in to the jury *sua sponte*.

The same principle that the judicial discretion as to whether to submit additional matter to the jury during its deliberations should not be exercised until a *request* therefor has first been made by the jury has been followed in this Circuit.

The Circuit Court overlooked and ignored its own doctrine, that unless the jury first requests additional material during their deliberations, the trial judge has no discretion to send any additional material to the jury during their deliberations.

In *United States* v. *Koska*, 443 F. 2d 1167 (2d Cir.) *cert. denied* 404 U.S. 852 (1971), the Second Circuit Court of Appeals emphasized that the jury's request (for copies of tape transcripts) had been explicit and indicated that only such a specific *request* could have been granted. The court said:

". . . later, *in response to an explicit request* (the jury) was allowed to have twelve copies of the transcript during deliberations. . . . No good reason appears for denying a transcript to a jury which has requested it. . . ."

In *Koska*, in other words, the court affirmed the procedure which had been followed, and strongly emphasized that a *request* by the jury had been made.

In the instant case, the jury did not request the August 3rd tape, and the trial judge ignored the directive of the *Koska* opinion when he sent that tape to the jury.

In *United States* v. *Carsons,* 464 F. 2d 424 (2d Cir.), *cert. denied* 409 U.S. 949 (1972), the Second Circuit Court of Appeals commented:

> "(We) hold that it was not an abuse of discretion to admit the tapes and transcripts into evidence nor error to *allow the jury* to retain the transscripts during the trial and their deliberations." 464 F. 2d at 437 (emphasis added)

Thus, the opinion clearly indicates that the jurors took affirmative action, upon their own initiative, to secure permission to retain the transcripts in their possession during deliberations and that, only after the jurors made their *request,* did the trial judge "allow" them to "retain" the transcripts.

In *United States* v. *Rosenberg,* 195 F. 2d 583 (2d Cir.) *cert. denied,* 344 U.S. 838, *rehearing denied,* 344 U.S. 889 (1952), during the jury's deliberations, they *requested* that a portion of a witness' testimony on direct examination be read back, and the judge granted the request. In the juror's presence, defense counsel asked the court to order the reading of the cross-examination of the same witness. The trial judge refused to do so, *unless the jury requested to hear the cross-examination testimony.* On appeal, the ruling of the trial judge was upheld, the Court of Appeals saying:

> "We think that the jury understood from the colloquy that the cross would be read *if the jurors so desired, and that their silence meant they had no such desire."*

In the instant case, the request of the jury was silent concerning the August 3rd tape. This indicates, as the *Rosenberg* court held, that the jury had no desire to hear that tape. Therefore, the trial court, under the reasoning of *Rosenberg,* should not have sent material to the jury *without its express request,* and by so doing, the judge

erroneously pierced the veil of secrecy and privacy of the deliberations of the jury by violating the above standards.

The Circuit Court arbitrarily imposed a false standard of exclusion in an attempt to rationalize and justify submission of additional unrequested matter to the jury during deliberations, viz. "prejudice of the judge against the defendant". It is the *effect* of the additional submission upon the jury, not the *intent* of the judge in submitting such material.

The Circuit Court pointed out that the difficulty arose because the trial judge failed to follow the prescribed rules in not calling for a conference with counsel, to ascertain if there was any question as to what the jury had requested. Although it was the trial judge's error, the petitioners were the only who were damaged and prejudiced. If such a discussion had been held, counsel might have persuaded the judge not to submit the August 3rd tape. The declaration of the mistrial upon motion by Gentile in which LaPonzina refused to join and had no standing, after jeopardy had attached, barred the retrial of LaPonzina before the newly selected jury.

The Circuit Court failed to apply the doctrine of "manifest necessity" to La Ponzina.

The Circuit Court has misconstrued the doctrine of *United States* v. *Jorn*, 400 U. S. 470 (1971), that the double jeopardy rule is not bottomed upon the Court's assessment of which side benefitted from the mistrial ruling. Certainly, Mr. Justice Harlan, who wrote the *Jorn* opinion, was aware of *Gori* v. *United States*, 367 U. S. 364 (1961), inasmuch as he had concurred in the majority opinion in *Gori*.

The Circuit Court overlooked the fact that *Jorn* the leading case, undercut *Gori*.

In the instant case, there is no indication that the trial judge gave any thought at all to La Ponzina's "valued right" to have the original jury hear and decide the case.

Nothing appears to show, in the words of *United States* v. *Jorn, supra,* that the judge took care to assure himself that the situation warranted foreclosing La Ponzina from a potentially favorable judgment. "There was no manifest necessity here for depriving" La Ponzina of his original tribunal; hence the doubel jeopardy bar will prevent a new trial.

La Ponzina had a strong interest and a valued right in having the original jury hear and decide the question of his guilt, and this right should not be taken away lightly.

Insofar as La Ponzina is concerned, no manifest necessity is readily apparent and the trial judge's exercise of discretion failed to meet the standard of "manifest necessity" and "public justice" insofar as La Ponzina is concerned; hence, the right to be free from double jeopardy bars a new trial for La Ponzina.

Jeopardy had already attached when the prosecutor delivered his improper opening statement. By anticipating the defense of entrapment asserted by Gentile, the prosecutor deprived La Ponzina of his Fifth Amendment rights.

In *United States* v. *Perez,* 22 U.S. (9 Wheat.), 579 (1824), this Court laid down the standard for the double jeopardy:

> ". . . the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, *there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.*"
>
> • • •
>
> "To be sure, *the power ought to be used with the greatest caution, under urgent circumstances, and for every plain obvious causes;* . . ."

In *Jorn, supra,* this Court held that double jeopardy barred retrial and reaffirmed that a sound exercise of discretion must clearly appear to prevent the doube jeopardy

bar. In that case, said this Court, the trial judge did not exercise deliberate and sound discretion when he weighed against the importance of the defendant's right to have the original jury decide his case. This Court continued:

> "In the absence of such a motion, (for mistrial), the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings."

Jorn is of particular relevance to the instant case since there, as here, La Ponzina's attorney merely made one or two suggestions in the side bar discussion in behalf of Gentile. However, such contribution by counsel is not consent on the part of La Ponzina to the mistrial.

The effect of the *Jorn* decision is discussed in *United States* v. *Walden,* 448 F. 2d 925 (4th Cir. 1971).

The government conceded that if La Ponzina had moved for a mistrial, the motion should have been denied, provided he was the sole defendant. It is difficult to understand the converse thereof, to wit; that merely because there were joint defendants, the motion should be granted as to both, even though La Ponzina had no grounds therefor and did not join in the motion.

CONCLUSION

The issues above discussed are, it is submitted, of sufficient substantiality to require a review by the United States Supreme Court.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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(IRWIN KLEIN)
Of Counsel

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 260—September Term, 1975.
261

(Argued September 19, 1975 Decided October 22, 1975.)
Docket Nos. 75-1248
75-1249

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH GENTILE and ERNEST LAPONZINA,

Defendants-Appellants.

Before:

FRIENDLY, TIMBERS and GURFEIN,

Circuit Judges.

Appeal from a judgment of the District Court for the Eastern District of New York, Mark A. Costantino, *Judge*, convicting appellants, after a verdict, on a four count indictment for offering to bribe and bribing an employee of the Internal Revenue Service, and for conspiring to do so, in violation of 18 U.S.C. §§ 201(b) and 371.

IRWIN KLEIN, Esq., New York, N.Y., *for Defendants-Appellants.*

Appendix "A"

KIRBY PATTERSON, Esq., Department of Justice, Washington, D.C. (David G. Trager, United States Attorney, Eastern District of New York, and Sidney M. Glazer, Esq., Department of Justice, Washington, D.C., of Counsel), *for Appellee.*

FRIENDLY, *Circuit Judge:*

Joseph Gentile and Ernest LaPonzina appeal from convictions after a jury trial in the District Court for the Eastern District of New York. Gentile was convicted on two counts of offering a bribe of $3,000 and giving such a bribe to I.R.S. Special Agent Nicholas Tsotsos on June 14 and 15, 1972, respectively, in violation of 18 U.S.C. § 201(b). Both appellants were convicted on a count of offering a bribe of $1,000 and free golf lessons and giving such a bribe to Tsotsos between June 14 and August 9, 1972, also in violation of 18 US.C. § 201(b). Both appellants were convicted of conspiring to give the latter bribe, in violation of 18 U.S.C. § 371. Appellants' legal contentions can be understood without a detailed statement of the facts.

I.

The most serious contention is one raised and raisable solely by LaPonzina. Initially the judge had granted LaPonzina's motion for severance. Then, at his request, the ruling was reversed. Later he changed his mind again, but the judge refused a second request for severance.

After a jury had been selected, the prosecutor, Mr. Barlow, made an extended opening. Evidently thinking that some explanation of this was needed, he told the jury that they had heard the judge talk about a possible defense of entrapment; that they were going to hear a

lot of argument about it; and that, as triers of the fact, under instructions from the judge on the law, they would have to decide whether Gentile and LaPonzina were forced into committing a crime or whether Agent Tsotsos merely afforded them an opportunity. Therefore, when hearing Agent Tsotsos and particularly when listening to tapes of various conversations, they should attend "very, very carefully to the words that are used, the phrasing that is being used, the inflections of the people's voices . . . ."

The judge then inquired whether Gentile's attorney, Mr. Schettino, wished to open. Schettino asked permission to approach the side bar. He objected to the prosecutor's having anticipated the defense of entrapment. The court agreed that the prosecutor "should not have made that statement." The prosecutor answered that the entrapment defense had been raised by preliminary motion of a previous counsel on behalf of Gentile and had been referred to in the *voir dire* of the jurors. Mr. Klein, attorney for LaPonzina, entered the fray in support of the argument that the opening had been improper, since "[y]our main case is only what *you* are supposed to tell them." The judge said that the argument "raises a problem. I do not know how serious it is. It may not be serious at all." After a further intervention by Mr. Klein, urging the impropriety of the opening, the judge declared a recess. When he returned, he excused the jury and told counsel that he thought the prosecutor's remark might prove prejudicial if in fact no entrapment defense was offered. He asked for briefs both on the question of prejudice and on the issue whether declaration of a mistrial "would involve a double jeopardy situation," adding that he thought it would not.

After an adjournment, without awaiting the briefs, the judge addressed counsel as follows:

> I have given it a lot of thought as to the problem that faced the Court this morning as to the opening

statement made as to the question of the defendants having a defense of entrapment and whether or not it would prejudice the jury. And I have also given a lot of thought, without having briefs, as to the motion made for a mistrial.

The motion—is it being made by both defendants for a mistrial?

Mr. Klein: Mr. Schettino made the motion.

The Court: I want to know if you are making it too?

Mr. Klein: May I consult with my client for a moment, your Honor?

(Pause.)

Mr. Klein: Your Honor, I spoke to Mr. LaPonzina and we feel that the question of entrapment really affects Mr. Gentile and it is not our motion to make.

The Court: That's not the reason why I asked it, Mr. Klein. You know the reason I asked whether or not you join in the motion of the defendant Gentile for a mistrial, so that I have the consent of both the defendants to select a new jury tomorrow morning.

Mr. Klein: I do not join in the motion. I do not think it is mine to join in or not.

Normally you say you will go along with your brother attorney but Mr. LaPonzina is in a different position from Mr. Gentile.

The Court: Then if you do not join in the motion, you are part of the argument of the motion that the statement made by the prosecutor as to a defense of entrapment to the jury is prejudicial. You did join in the original motion.

Mr. Klein: I participated in it.

The Court: Since you participated in it, the Court would have the right to assume that you were joining in the motion.

Appendix "A"

It is this Court's opinion at this time that the better way to proceed would be to select a new jury rather than go through a ten-week trial and have this as one of the issues on appeal, where that could be cured immediately.

Secondly, it cannot be cured merely by asking the jury to disregard it, since a motion has been made for a mistrial and no double jeopardy would attach, we can start with a clean slate. The jury can be selected tomorrow morning.

A further discussion ensued. Gentile's counsel claimed that the granting of his motion for a mistrial would prevent a new prosecution under principles of double jeopardy. After the judge had dismissed this contention on the ground of consent by Gentile's counsel, the following colloquy took place:

Mr. Klein: On behalf of the defendant LaPonzina I do not join in the motion. I did not consent.

The Court: You discussed the motion this morning as to entrapment and I will take it as a consent that this jury should not hear the case—an implied consent.

As long as you want to play with me, I will do it my way. It is an implied consent on your part and a motion by the defendant that there would be prejudice to both defendants, because they are both involved in the same manner and on the same tapes.

Mr. Klein: May I add for the record that my participation in the argument was in assistance of Mr. Schettino's argument and certainly not intended as a consent by Mr. LaPonzina.

The Court: You represent your client and you represent him for all purposes. You cannot separate the discuss[ion] on one part from another.

Appendix "A"

After further discussion, the court delivered an oral opinion explaining why in its view the declaration of a mistrial would not prohibit a new trial of both defendants. Mr. Klein again endeavored to dissociate himself from the motion for a mistrial, saying that LaPonzina "really does not have a defense of entrapment," that his remarks in support of the motion for a mistrial had been made in the discharge of his "duty as an officer of the Court, where I can shed some light on the subject, to volunteer," and that he had thereafter apprised the court that he did not join in the motion. After telling Mr. Klein to "take a look at the minutes," the court denied his motion to dismiss the indictment against LaPonzina. A new trial began the next morning and resulted in the convictions here under appeal.

This case is another illustration of the wisdom of Mr. Justice Story's statement in the seminal case of *United States* v. *Perez*, 9 Wheat. (22 U.S.) 579, 580 (1824), that "it is impossible to define all the circumstances which would render it proper" for the trial court to abort a criminal trial without giving rise to a defense of double jeopardy, and Mr. Justice Black's remark in *Wade* v. *Hunter*, 336 U.S. 684, 690 (1949), concerning the impossibility of laying down a "rigid formula" on the subject. While LaPonzina's counsel may not have consented to the declaration of a mistrial, he had heavily contributed to it. His intervention at the initial conference at sidebar had served to stimulate the judge's concern. Nothing in his remarks at sidebar indicated that the prosecutor's reference to both defendants in regard of an entrapment defense would prejudice only Gentile; indeed, if LaPonzina had no entrapment defense, as Mr. Klein later said, the opening was more prejudicial to him than to Gentile, not less. If counsel felt it to be his duty as an officer of the court to "shed some light on the subject," the light should have included them, not later, an indication that LaPonzina

did not regard the remark as prejudicial to him and wanted his trial to proceed, failing which he would claim double jeopardy. If the judge had realized from the start that compliance with the request of Gentile's counsel would require separate trials that would otherwise be quite needless or would create a serious double jeopardy claim by LaPonzina, he might well have given more consideration to the course not pressed by anyone, that admonishing the jury to disregard this part of the prosecutor's opening would suffice.[1] By the time LaPonzina's counsel made his position clear, the addition of his initial remarks to those of Gentile's counsel had led the judge to become convinced that the prosecutor's error had been far more serious than it had first seemed to be.

Quite apart from the action of LaPonzina's counsel in helping to lead the judge to the precipice, LaPonzina's double jeopardy claim must fail under the principle of *Gori* v. *United States,* 367 U.S. 364 (1961). In that case, which came to the Supreme Court from this court, the trial judge aborted the trial of his own motion during the examination of the fourth witness for the Government, apparently because he "inferred that the prosecuting attorney's line of questioning presaged inquiry calculated to inform the jury of other crimes by the accused, and took action to forestall it." 367 U.S. at 366. Although we thought the judge had been "overzealous" and had acted "too hastily," 282 F.2d 43, 46, 48 (2 Cir. 1960), we rejected a double jeopardy claim on the basis that the action of the trial judge was within his discretion and was the product of what the Supreme Court characterized as his "extreme solicitude—an overeager solicitude it may be

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[1] In fact Gentile relied heavily on the entrapment defense at the "second" trial; indeed, the judge gave an entrapment charge as to both defendants without objection.

—in favor of the accused." 367 U.S. at 367. Giving meaning to the famous phrase "manifest necessity" in *United States* v. *Perez, supra,* 9 Wheat. at 580, Mr. Justice Frankfurter said, 367 U.S. at 368:

> Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment.

He added, 367 U.S. at 369-70:

> Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment—cases in which the defendant would be harassed by successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused. Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial. It would hark back to the formalistic artificialities of seventeenth century criminal procedure so to confine our federal trial courts by compelling them to navigate a narrow compass between Scylla and Charybdis. We would not thus make them unduly hesitant conscientiously to exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused.

Appendix "A"

Our case seems *a fortiori* to *Gori* in three respects: the prosecutor's opening was arguably more prejudicial to the defendants than the questions in *Gori*, although not deliberately so; the defendants had argued that it was prejudicial; and the declaration of a mistrial came before any testimony had been taken.[2]

LaPonzina relies heavily on Mr. Justice Harlan's plurality opinion in *United States* v. *Jorn*, 400 U.S. 470 (1971). The judge in that case had aborted the trial not in the interest of the defendants but in that of witnesses who he thought had not been adequately informed of their constitutional rights. Mr. Justice Harlan reiterated the *Gori* holding, 400 U.S. at 482, explained that in *Jorn* "the judge's insistence on stopping the trial . . . was motivated by the desire to protect the witnesses rather than the defendant," 400 U.S. at 483, rejected as a speculation the Government's argument that in fact the judge's action had benefited the defendants, and stated the Court's inability "to conclude on this record that this is a case of a mistrial made 'in the sole interest of the defendant,' " citing *Gori*.

If the opinion had stopped at that point, there would be no basis for arguing that it undercut *Gori*, in which Justice Harlan had joined. However, he went on to say "that a limitation on the abuse-of-discretion principle based on an appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision." 400 U.S. at 483. As we read the further discussion, 400 U.S.

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[2] We do not, of course, mean by this last clause that defendants had not yet been placed in jeopardy. The point is rather that in weighing the harm to the defendant incident to a new trial against the desirability of the court's protesting a defendant from prejudice (and retrial after a possibly successful appeal), even without an application on his part, the length of his exposure at the first trial is a relevant consideration.

at 483-87, particularly as illumined by Mr. Justice Stewart's dissent, 400 U.S. at 490-91, Mr. Justice Harlan was laying down in dictum a *per se* rule that when the aborting of a criminal trial was an abuse of discretion, a double jeopardy defense would prevail even if the judge's sole intention was to benefit the defendant.[3]

The Court returned to the subject in *Illinois* v. *Somerville*, 410 U.S. 458 (1973). There the declaration of a mistrial was triggered not by matters arising in the examination of witnesses as in *Gori* and *Jorn*, but by the discovery, after the jury was impaneled, that the indictment was invalid. Although Somerville clearly would have preferred to go to trial on the invalid indictment since under Illinois law the defect was uncorrectible, the Court rejected a double jeopardy claim. It reaffirmed "[t]he broad discretion reserved to the trial judge" to abort a criminal trial without subjecting a defendant to double jeopardy forbidden by the Constitution, 410 U.S. at 462. It quoted with approval the statement in *Gori*, 367 U.S. at 368, which we have reproduced above. *Jorn* was distinguished, 410 U.S. at 466, on the basis that, as had there been stated, the trial judge in that case "made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial," 400 U.S. at 466.

Although reconciliation of *Gori* and *Somerville*, in which the double jeopardy claim was rejected, with *Downum* v.

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[3] Mr. Justice Stewart, speaking also for Justices White and Blackmun, thought "[t]he real question" to be "whether there has been an 'abuse' of the trial process resulting in prejudice to the accused, by way of harassment or the like, such as to outweigh society's interest in the punishment of crime." 400 U.S. at 492.

There may be circumstances when a double jeopardy defense should prevail even though the declaration of a mistrial was not an abuse of discretion, e.g., when a prosecutor, sensing that things are not going well, deliberately makes a highly inflammatory remark.

United States, 372 U.S. 734 (1963), and *Jorn*, where it was sustained, has posed some difficulties for the commentators, see Kamisar, LaFave & Israel, Modern Criminal Procedure 1442 note 3 (1974)—not to speak of the numerous and vociferous dissents of the Justices[4]—we have little doubt that principles recognized in all these cases dictate affirmance even if we were to disregard the role played by LaPonzina's counsel and even more clearly when we take this into account. The facts are indistinguishable from *Gori*, and even if we take that decision as having been qualified by *Jorn* in a manner not wholly eradicated by *Somerville*, this case falls within the *Gori-Jorn* composite standard of lack of abuse of discretion in declaring a mistrial because of an inadvertent error of the prosecutor and benefit to the defendant as the sole motivation. *See United States* v. *Spinella*, 506 F.2d 426, 431 (5 Cir. 1975) (Wisdom, *J.*), *cert. denied*, —— U.S. —— (1975). How far a double jeopardy defense may be precluded in other situations, such as that in *Somerville*, is not here before us.

Review of the transcript convinces us that the judge had been persuaded by defense counsel that the prosecutor, although unwittingly, had subjected the defendants to serious prejudice by suggesting they would not contest the acts charged by the Government but would defend themselves on the ground of entrapment. In declaring a mistrial he not only was acting "in the sole interest of the defendant[s]," *Gori*, 367 U.S. at 369, but within the permissible bounds of discretion. On any view of the colloquy at least

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[4] All four decisions were rendered by divided courts, with unusually sharp dissents. Mr. Justice Stewart, speaking for three dissenters in *Jorn*, thought that it was "both overbroad and flatly inconsistent with this Court's decision in *Gori* v. *United States*," 400 U.S. at 491. Mr. Justice Marshall, dissenting in *Somerville*, thought the majority "substantially eviscerates the rationale" of *Jorn* and *Downum*. 410 U.S. at 477.

one defendant had asked for a mistrial; where no evidence has been presented and no delay will ensue, we do not think a trial judge must take one horn or the other of the dilemma of refusing to recognize what he considers a valid claim of prejudice or granting a severance in order to forfend a successful claim of double jeopardy. See *Scott* v. *United States,* 202 F.2d 354, 355 (D.C. Cir.), *cert. denied,* 344 U.S. 879 (1952). It is immaterial that, in the exercise of appellate hindsight, we may not regard the prejudice as so great or so incurable by less drastic means.

This analysis does not run contrary to *United States* v. *Glover,* 506 F.2d 291 (2 Cir. 1974). In *Glover* we upheld a claim of double jeopardy where, after several days of a multi-defendant trial, the court granted a Government motion to sever Glover, which had been made as a result of a ruling that a statement that the Government wished to introduce against Glover could not be admitted, under *Bruton* v. *United States,* 391 U. S. 123 (1968), because of its prejudicial effect on co-defendants. *Glover* was a very different case. Exclusion of the statement was not mandated to protect Glover's interest; rather it was to safeguard the interests of his co-defendants. The Government should not have allowed the trial to proceed without a severance if its case against Glover depended on a statement inadmissible because of its prejudicial effect on other defendants. As Judge Gurfein pointed out, 506 F.2d at 298, the inadmissible statement was the functional equivalent of the missing witness in *Downum* v. *United States, supra,* 372 U.S. at 735; if the trial had proceeded after the exclusionary ruling, Glover stood a far better chance of acquittal than in the subsequent separate trial in which the statement was admitted. Here it is sheer speculation that LaPonzina would have fared better at the hands of the first jury, which had heard the prejudicial statement of the prosecutor, than with the second, which had not.

II.

The prosecutor's case was based on the conversations between Special Agent Tsotsos and the defendants, to which Tsotsos testified, and tapes of which were introduced into evidence. At his first meeting with Gentile, Tsotsos informed Gentile of some of his legal rights, but not of his right to have counsel present; at the first meeting with LaPonzina, even skimpier information was provided. Tsotsos thus appears to have failed to follow the procedures stipulated for special agents in IRS News Release No. 897, issued October 3, 1967, and News Release No. 979, issued November 26, 1968;[5] the government does not argue otherwise.

At a pre-trial hearing, Mr. Klein moved "to suppress any conversation Tsotsos had with the defendant LaPonzina"; the district court denied the motion on the ground that the IRS directives were merely "a guide to their own employees by an administrative agency." At trial, defense counsel did not object when Tsotsos testified to his conversations with their clients. Rather, on cross-examination they sought to bring out that Tsotsos had not followed IRS procedure for conducting a criminal investigation; apparently their purpose was to strengthen their claim that the defendants had been entrapped into bribery. However, following Tsotsos' testimony and again at the close of the evidence, Mr. Klein moved to have the evidence suppressed, to no avail. The defense also requested that the jury be charged that they could suppress the statements if they found that these would not have been given but for the Agent's failures to warn. The trial

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[5] The press releases are substantially reproduced in *United States* v. *Leonard*, —— F.2d ——, —— (2 Cir. 1975), slip opinions 5843, 5859-60.

judge indicated that he would give a charge referring to the regulations only in regard of the defense of entrapment, which he did do to some extent.[6]

Appellants now claim error, both in the failure of the trial judge to suppress the statements, and in his failure to charge the jury that they might do so. However, here, as in *United States* v. *Leonard*, —— F.2d ——, —— (2 Cir. 1975), slip opinions 5843, 5859-63, we are not obliged to determine whether we would follow the lead of other circuits which have held that violation of the News Releases mandates the exclusion of incriminating statements. *United States* v. *Heffner*, 420 F.2d 809 (4 Cir. 1969); *United States* v. *Leahey*, 434 F.2d 7 (1 Cir. 1970); *United States* v. *Sourapas*, 515 F.2d 295 (9 Cir. 1975). Even if we were to adopt that rule, suppression would not be warranted in this case.

The purpose behind the stipulation by the IRS of these procedures for special agents was to extend the protection of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), to criminal tax investigations conducted in a noncustodial setting. *United States* v. *Leahey, supra*, 434 F.2d at 8. A failure to give *Miranda* warnings, however, even in a custodial setting, would not prevent a prosecution for an attempt to bribe a law enforcement officer made subsequent to the arrest. *United States* v. *Perdiz*, 256 F. Supp. 805 (S.D.N.Y. 1966); cf. *Vinyard* v. *United States*, 335 F.2d 176, 181-83 (8 Cir.), *cert. denied*, 379 U.S. 930 (1964); *United States* v. *Soles*, 482 F.2d 105, 108 n.4 (2 Cir.), *cert.*

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[6] The Court charged:

> You have heard that agent Tsotsos, in violation of an administrative regulation of the Internal Revenue Service, failed to advise the defendants of their rights at his initial meeting with each defendant. You must treat this information like any other piece of evidence, that is, you must determine the weight to be given this testimony.

We must confess that this would not have contributed greatly to our understanding had we been on the jury.

denied, 414 U.S. 1027 (1973). We doubt also that it should prevent proof of the crime of bribery by showing the required intent through statements that would be excludable under *Miranda* if used to prove the crime to which the statements relate.[7] Exclusion of statements offered for the former purpose would seem an unnecessary extension of *Miranda* even in cases of custodial interrogation; the basic purpose of *Miranda,* to prevent abusive police interrogation of persons not aware of their right to remain silent, hardly extends to tax evaders whose quick reaction is to offer to bribe the investigating officer and are then prosecuted for doing so. It seems even more unlikely that the IRS intended its News Releases to bar a Special Agent from telling the full story of an attempt to bribe him simply because he had failed to give the specified warnings.

However, we are not obliged to resolve even that issue in this case. The defendants made no effort to differentiate the statements, either at the appellate level or, more importantly at trial. Since the effect of the IRS News Releases was presented to the judge as an all-or-nothing matter, including exclusion of bride offers, we do not think he was required to separate out the statements concerning the tax case which were the most that were even arguably excludable. Since there was no warrant for suppression of all the statements by the judge, he certainly was not obliged to instruct the jury that they might suppress some or all of the incriminating conversations—a dubious procedure on any view.

III.

While the jury was deliberating, it sent a note to the judge stating:

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[7] The district judge ruled, as a matter of relevance, that statements relating to "the tax matter will not be offered to the jury on the basis of the tax case but rather goes toward the intent of bribery and not for tax purposes."

Appendix "A"

> We would like to hear the playing of the tape connected with *count three*. Referring to $1000 and Golf Lessons.

Confusion began with a remark of the clerk:

> Note on the tapes, they want to hear the tapes in reference to Count Three as to one thousand dollars and the golf lessons. I understand on two different tapes.

The prosecutor joined in:

> Yes, your Honor. A thousand dollars mentioned twice on the tape of August 3rd and we have it on the machine. The golf lessons mentioned on August 8.

Mr. Klein, representing LaPonzina, pointed out that the note said "tape" not "tapes."

Instead of taking a few minutes in an endeavor to work out the problem with counsel, the judge said:

> Mr. Klein, when it gets to this stage, I run the court with the jury. I will ask them when they come out, I will conduct it and I will do everything. I take no suggestions and I'm telling you something. I just don't want to argue with you and I take no suggestions as to what I shall do with this jury at this stage of the proceeding.
>
> From here on, your case is finished. It's now up to the Court what it does with the jury.

The jury was brought in and the judge asked whether they wanted to hear the tape "connected with Count Three referring to one thousand dollars and golf lessons." The foreman first answered "Yes." Then, in response to a renewed inquiry, he said, "We want to know about the

thousand dollars." Later the foreman seemed to specify the tape of August 8 or 9; the former, in addition to having language that could be construed to be an indirect reference to the $1,000, was the only tape that referred to the golf lessons.

At the instance of the prosecutor, the playing began with the tape of August 3. When Mr. Klein objected that this was not what the jury asked for, the judge again silenced him and instructed the jury to advise if what was being played was not what it wanted. After more objections and discussion, the judge again told the jury to point out if what they were hearing was not what they wished. The jury heard the August 3 tape without objection on its part. and, after some further colloquy, the August 8 tape. Later, in response to a further request, the August 9 tape was played.

Assuming that the jury requested to hear only the August 8 and 9 tapes—and on this record it is hard to be sure exactly what the jury did want—appellants argue that playing the August 3 tape violated a principle that "in the absence of a request, the judge is not free to send material in to the jury *sua sponte*." The Government's brief makes no real response, except for a suggestion that the point was sufficiently met by the judge's telling the jury that if it had any objection to hearing the August 3 tape, it could say so.

If the legal norm were as demanding as appellants contend and the Government seems to concede, we doubt that it could be satisfied that easily. Apart from the problems how far the foreman might feel that he could speak for a jury sitting in open court, whether any other juror would feel free to do so, and what would happen if the jurors disagreed, jurors may be reluctant to tell a judge they do not want to hear something that was being played for or read to them at his direction even if, as here, he had made

abundantly clear that they could. The legal principle, however, is not so unyielding. It is well stated in the ABA Standards Relating to the Administration of Criminal Justice, Trial by Jury § 5.2(b) (1968):

> The court need not submit evidence to the jury for review beyond that specifically requested by the jury, but in its discretion the court may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

In *United States* v. *Tager,* 481 F.2d 97, 101 (10 Cir. 1973), *cert. denied,* 415 U.S. 914 (1974), and *State* v. *Miller,* 467 P.2d 683, 684-85, 2 Or. App. 353 (1970), trial courts which insisted that a jury hear all of a witness' testimony, rather than the partial segment the jury had requested, were affirmed on appeal. In *Commonwealth* v. *Peterman,* 430 Pa. 627, 244 A.2d 723 (1968), where the jury asked for the testimony of one witness and the trial judge in addition summarized for them the testimony of another, reversal was based not on the ground that going beyond the jury's request was *per se* impermissible, but rather on the facts that the trial judge had summarized the testimony rather than having it read back; that in so doing he had misstated it; and that the effect of misstating "was to place undue emphasis on the portions of [a witness'] testimony most damaging to Peterman . . . and the Commonwealth's theory . . . was unduly stressed." 244 A.2d at 728-29. In our own *United States* v. *McCarthy,* 473 F.2d 300 (2 Cir. 1972), we refused to reverse where, as part of a general claim that the trial judge had unduly interfered with the proceedings, the defendants pressed the point that he had allowed the entire testimony of a witness to be read back even after the forelady had said that the jury had heard enough. We found that the judge had not "in any way

prejudiced any of appellants or displayed the slightest bias toward them" but rather had exercised his discretion "as to how much of a witness' testimony should be read back to the jury in the interest of fairness and completeness." 473 F.2d at 308. In other words, reversal for submitting material in addition to that requested is required only where the submission might indicate, or be fairly taken by the jury to indicate, prejudice of the judge against the defendant, as, e.g., when the judge insisted on submitting evidence favorable to the prosecution that was in no way germane to the request, or when it leads to a biasing of the record.

If the judge had decided in the exercise of his discretion that playing the August 3 tape was necessary or desirable to enable the jury to understand the tapes of August 8, and 9, there would thus have been no case for reversal. The subject matter of the August 3 tape was closely related to that of the August 8 and 9 tapes, for which the jury had asked; consequently the jury could not have thought that the additional playing of the August 3 tape indicated any prejudice by the judge; and there is no claim of incorrectness. Such difficulty as exists comes from the failure of the trial judge to follow the instructions in *United States* v. *Schor,* 418 F.2d 26, 31 (2 Cir. 1969), that when a jury's request for testimony is not clear "the judge should consult with counsel for both sides to see if there is disagreement as to what should be submitted to the jury." Here the judge simply dismissed counsel's objection and relied on letting the jury do the job he should have performed. Conceivably discussion with counsel might have led to a withholding of the August 3 tape even though it would have been permissible to play it whether or not requested. But, viewing the case as a whole, we do not think this an appropriate situation for reversing because of a failure to exercise discretion when what was done did not fall outside permissible bounds, 28 U.S.C. § 2106.

IV.

LaPonzina claims that the evidence showed merely that he knew that Gentile offered and paid a bribe on his behalf, and that he was entitled to an acquittal under *United States* v. *Stromberg*, 268 F.2d 256 (2 Cir.), *cert. denied*, 361 U.S. 863 (1959). As we read the testimony, there was sufficient evidence to carry the case to the jury, which decided this contention adversely to the defendant.

Defendants' other contentions do not merit discussion.

Affirmed.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of December, one thousand nine hundred and seventy-five.

Present: HON. HENRY J. FRIENDLY
HON. WILLIAM H. TIMBERS
HON. MURRAY I. GURFEIN
Circuit Judges

75-1248

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH GENTILE, ERNEST LA PONZINA,
Defendants-Appellants.

VINCENT LUCADANA,
Defendant.

A petition for a rehearing having been filed herein by counsel for the appellants Joseph Gentile and Ernest La Ponzina,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

APPENDIX "C"

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of December, one thousand nine hundred and seventy-five.

75-1248

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH GENTILE and ERNEST LA PONZINA,

Defendants-Appellants,

VINCENT LUCADANA,

Defendant.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellants Joseph Gentile and Ernest La Ponzina, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN, Chief Judge

APPENDIX "D"

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 14th day of November, one thousand nine hundred and seventy-five.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH GENTILE and ERNEST LA PONZINA,

Defendants-Appellants,

VINCENT LUCADANA,

Defendant.

It is hereby ordered that the motion made herein by counsel for the appellants filed November 5, 1975 to stay issuance of the mandate and to continue appellants on bail pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41 (b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

HENRY J. FRIENDLY

WILLIAM H. TIMBERS

MURRAY I. GURFEIN, Circuit Judges

APPENDIX "E"

Exhibit—I.R.S. Regulation.

C C H
TAX MANUAL

Part IX—Intelligence

General Procedures
9384.1
General—Cont.

9384.2

Advice by Special Agents to Subjects of Investigation

(1) Procedures to be followed by special agents in the interrogation of persons in custody are outlined in IRM 9440.

(2) The following procedure will be followed by special agents in their initial non-custody meetings with subjects of investigation:

(a) At the outset of his first official meeting with the subject of an investigation, the special agent will properly identify himself as a special agent of the Internal Revenue Service and will produce his authorized credentials to the subject for examination. The special agent will further state: "As a special agent, one of my functions is to investigate the possibility of criminal violations of the internal revenue laws, and related offenses."

(b) Immediately following the explanation, the special agent will then advise the subject of the investigation substantially as follows:

> "In connection with my investigation of your tax liability (or other matter) I would like to ask you some questions. However, first I advise you that under the Fifth Amendment to the Constitution of the United States I cannot compel you to answer any questions or to submit any information if such

answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any documents which you submit may be used against you in any criminal proceeding which may be undertaken.

I advise you further that you may, if you wish, seek the assistance of an attorney before responding."

(c) If the subject requests clarification, whether as to his rights or the purpose of the investigation, the special agent will give such explanation as is necessary to clarify the matter for the subject.

(d) If at any stage of an interview the subject indicates that he wishes to exercise his rights to withhold his testimony or records, or to first consult with an attorney, the special agent will terminate the interview.

(e) In each investigation, the special agent will make a contemporaneous memorandum stating when and where the subject was advised pursuant to the above procedures, what additional explanation, if any, was made; how the subject responded; and who was present at the time.

(3) At any official contact with any person the special agent will not use trickery, misrepresentation or deception in obtaining any evidence or information, nor will he use language which might constitute a promise of immunity or settlement of the principal's case, or which might constitute intimidation or a threat.

(4) Other subsections of the Internal Revenue Manual bearing on constitutional rights are:

(a) IRM 9352—Rights of Witnesses
(b) IRM 9363—Use of Summons
(c) IRM 9383—Development of Evidence
(d) IRM 9445—Procedure After Arrest
(e) IRM 9451—Searches With Warrants
(f) IRM 9452—Searches Without Warrants

APPENDIX "F"

Request No. A-2.

You have heard the testimony that the Internal Revenue Service regulations require the Special Agent to identify himself as such, describe his function and advise the taxpayer of his rights at the initial meeting. Specifically, that taxpayer may remain silent and that anything he says may be used against him, and that he cannot be compelled to incriminate himself by answering any questions or producing any documents and that he has the right to seek the assistance of an attorney before responding. You heard Tsotsos admit that he refused and failed to advise Mr. LaPonzina of such right and that he flouted such regulations. You may consider Tsotsos' conduct in this regard as evidence of overreaching and entrapment as well as lack of credibility. Furthermore, you may also consider Tsotsos' conduct in this regard as a violation of the rights of Mr. LaPonzina as described by the department regulations and exclude any statements or evidence obtained from Mr. LaPonzina as a result of such violation by Tsotsos. If you find that Mr. LaPonzina may have incriminated himself but would not have done so had he been advised of his rights, then you may suppress and disregard any such incriminating testimony.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-961

JOSEPH GENTILE AND ERNEST LAPONZINA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that certain evidence should have been excluded because it was obtained in violation of administrative regulations and that the court misinterpreted a request made by the jury after it had begun deliberating to have a tape recorded conversation replayed. Petitioner LaPonzina also contends that the Double Jeopardy Clause of the Fifth Amendment barred his second trial and his ultimate conviction.

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of having bribed and conspired to bribe an employee of the Internal Revenue Service, in violation of 18 U.S.C. 2, 201(b) and 371.[1] Gentile was sentenced to concurrent

[1]Gentile was convicted on three counts and LaPonzina on one count of having bribed an employee of the Internal Revenue Service, in violation of 18 U.S.C. 201(b) and 2. Both petitioners were also convicted on one count of having conspired to bribe an I.R.S. employee, in violation of 18 U.S.C. 371.

terms of four years' imprisonment and was fined $5,000. LaPonzina was sentenced to three years' imprisonment, all but six months of which was suspended, and was placed on probation for thirty months. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that Special Agent Nicholas Tsotsos of the I.R.S. met with petitioner Gentile in September 1971 in connection with an investigation of certain of Gentile's tax returns. After having shown Gentile his credentials and explained that he was engaged in a criminal investigation, Tsotsos stated that he wanted to ask Gentile some questions but that Gentile did not have to answer and that any answers he did offer could be used against him. Gentile stated that he understood and gave Tsotsos permission to question him (App. 52a-53a).[2] Tsotsos then proceeded to ask Gentile about approximately $20,000 in checks that had been cashed for him in 1969 by his income tax advisor (Gov't App. 5b).

At subsequent meetings, Agent Tsotsos showed Gentile some of the checks that had been cashed in 1969. He also pointed out that there was a wide discrepancy between Gentile's annual expenditures and the income that he had reported. These conversations, all of which were recorded on a device concealed on Agent Tsotsos' person, eventually led to Gentile's suggesting that he and Tsotsos might be able to reach an accommodation that would avoid Gentile's prosecution (Gov't App. 5b-17b). On June 14, 1972, Gentile offered to pay Agent Tsotsos $3,000 to abort the investi-

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[2] "app." refers to the appendix to the brief filed by petitoners in the court of appeals. "Gov't App." refers to the appendix to the brief by the government in the court of appeals. Copies of both documents are being lodged with the Clerk of this Court.

gation. Gentile paid the bribe on June 15, 1972 (Gov't App. 18b-33b; App. 66a).

At the June 14th meeting, Agent Tsotsos also informed Gentile that he had a case against LaPonzina, and he asked whether Gentile could arrange a meeting with him (App. 63a-66a, 68a). Gentile subsequently agreed to do so, and the initial meeting with LaPonzina took place at Gentile's place of business on June 29, 1972 (Gov't App. 34b-38b). Following a later conversation with Gentile, who suggested that discontinuance of the investigation of LaPonzina was worth $1,000, Agent Tsotsos met with LaPonzina a second time and LaPonzina agreed to pay Tsotsos $1,000. Gentile gave Tsotsos the $1,000 on August 9, 1972 (App. 100a-107a, 118-119a, 136a-138a).

1. Petitioners first contend (Pet. 9-10) that the court erred in admitting at trial evidence concerning statements they had made during the meetings with Agent Tsotsos because Tsotsos had not first fully informed them of their legal rights.[3]

The purpose of the I.R.S. directives relied upon by petitioners in making this claim is to extend the protections accorded by *Miranda* v. *Arizona*, 384 U.S. 436, to criminal tax investigations conducted in a noncustodial context. As the court of appeals pointed out, however, the offer and giving of a bribe constitutes an offense independent of the offense of tax evasion, which was the basis for

[3]Petitioners base this claim upon the procedures that special agents of the I.R.S. have been directed to follow in conducting criminal tax investigations by I.R.S. News Release No. 897, issued on October 3, 1967, and News Release No. 979, issued on November 26, 1968 (see Pet. App. E). Agent Tsotsos did not fully advise petitioners of their legal rights in a criminal tax investigation at the outset of his meetings with them (Pet. App. A 13a).

the investigation of petitioners. The attempted corruption of a federal official in the performance of his legal duties constitutes an offense regardless of whether his acts, when considered in some other context, might have been procedurally deficient. *Vinyard* v. *United States*, 335 F.2d 176, 181 (C.A. 8), certiorari denied, 379 U.S. 930; *United States* v. *Perdiz*, 256 F. Supp. 805, 806 (S.D. N.Y.). It is therefore unnecessary to consider in this case whether violation of the I.R.S. directives would require the exclusion of incriminating statements in a prosecution for criminal tax fraud, or to hold this case pending the Court's disposition of *Beckwith* v. *United States*, No. 74-1243 (certiorari granted 422 U.S. 1006). As stated by the court of appeals (Pet. App. A 14a-15a; footnote and citations omitted):

> A failure to give *Miranda* warnings, * * * even in a custodial setting, would not prevent a prosecution for an attempt to bribe a law enforcement officer made subsequent to the arrest. * * * We doubt also that it should prevent proof of the crime of bribery by showing the required intent through statements that would be excludable under *Miranda* if used to prove the crime to which the statements relate. Exclusion of statements offered for the former purpose would seem an unnecessary extension of *Miranda* even in cases of custodial interrogation; the basic purpose of *Miranda*, to prevent abusive police interrogation of persons not aware of their right to remain silent, hardly extends to tax evaders whose quick reaction is to offer to bribe the investigating officer and are then prosecuted for doing so. * * *

2. Petitioners also contend (Pet. 11-13) that the court misinterpreted a request made by the jury after it had begun deliberating to have a tape recorded conversation replayed, as a result of which the court replayed a tape in

addition to that requested by the jury, and that this error requires the reversal of their convictions. But, as the court of appeals noted in rejecting this claim (Pet. App. A 19a):

> [R]eversal for submitting material in addition to that requested is required only where the submission might indicate, or be fairly taken by the jury to indicate, prejudice of the judge against the defendant, as, e.g., when the judge insisted on submitting evidence favorable to the prosecution that was in no way germane to the request, or when it leads to biasing of the record.

None of these conditions was present here. Thus, even if it is assumed that the court misinterpreted the jury's request,[4] petitioners' contention that their convictions should be reversed on this basis was properly rejected.[5]

3. Finally, petitioner LaPonzina contends (Pet. 13-15) that the Double Jeopardy Clause of the Fifth Amendment barred his second trial and ultimate conviction.

During his opening statement at petitioner's first trial, the Assistant United States Attorney stated that the jury would be required to decide whether petitioners had been entrapped into committing the offense with which they were charged. After the opening statement had been concluded,

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[4]After having reviewed the relevant communications from the jury, the court of appeals concluded that "on this record it is hard to be sure exactly what the jury did want" (Pet. App. A 17a).

[5]The only case from another circuit cited by petitioners, *Easley* v. *United States*, 261 F.2d 276 (C.A. 5), is entirely consistent with the court of appeals' holding in this case. The *Easley* court held simply that the trial court's granting of a request by the jury to have testimony reread to them was a matter within the trial court's discretion.

the attorney representing Gentile approached the bench, objected to the Assistant United States Attorney's having anticipated the defense of entrapment and moved for the declaration of a mistrial. LaPonzina's counsel argued vigorously in support of the motion (App. 13a-15a).

Following a short recess, the court informed counsel that he had concluded that the opening statement made on behalf of the government might prove prejudicial to petitioners if in fact no entrapment defense was offered. The court asked for briefs to be submitted dealing with the questions of prejudice and whether the declaration of a mistrial would pose double jeopardy problems (App. 16a-17a). After an adjournment, and without waiting for briefs, the court asked LaPonzina's counsel, Mr. Klein, whether the motion for a mistrial was being made on behalf of both defendants. After having consulted with his client, Klein stated that "the question of entrapment really affects Mr. Gentile and it is not our motion to make" (App. 18a). The court ultimately granted the motion for a mistrial, explaining in part (App. 23a-25a):

> The defendant Gentile's attorney made application to the Court after the Government had completed its opening for a mistrial. The application was made based upon the Government's assertion in the opening that there would be a defense of entrapment. * * * The attorneys for both defendants participated in the ensuing discussion and each argued the prosecutor's opening statement would be prejudicial and could not be cured by the Court issuing cautionary instructions.
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> Generally, double jeopardy will attach once a jury is sworn, but special circumstances allow the Court to declare a mistrial and select a new jury for a sub-

> sequent trial of the defendants. The test is "taking all the circumstances into consideration, whether there is a manifest necessity for the act or the ends of public justice would otherwise be defeated by a failure to take such action." [Citing *United States* v. *Perez*, 9 Wheat. 579, and *Illinois* v. *Somerville*, 410 U.S. 458.]
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> I find the statement made in the opening as to entrapment fully within the *Somerville* test. Therefore, a mistrial is declared * * * .

We submit that the trial court acted within the permissible bounds of its discretion in terminating petitioners' first trial and that petitioner LaPonzina's contention that his second trial and ultimate conviction were barred by the Double Jeopardy Clause must therefore be rejected. The fact that LaPonzina's counsel informed the court that Gentile, and not LaPonzina, was likely to rely upon an entrapment defense meant that the reference in the opening statement to an entrapment defense was potentially more prejudicial to LaPonzina than to Gentile. As noted, moreover, counsel for both petitioners argued that the prejudicial impact of the opening statement could not be cured with a cautionary instruction. Thus, as matters stood at the time the court was considering the options available to it in responding to the prosecutor's statement, the court was confronted with the vigorous assertions of LaPonzina's counsel that the suggestion that both petitioners would rely upon an entrapment defense had incurably prejudiced their defenses, combined with a refusal on LaPonzina's part to move for a mistrial as a means of dealing with the matter. At no time, however, did LaPonzina affirmatively invoke his "valued right" to go to verdict with the jury then impanelled by requesting that his initial trial be permitted to go forward or by objecting to the declaration

of a mistrial. Instead, his counsel simply stated that the motion "is [not] mine to join in or not" (App. 19a).

In these circumstances, we believe that the court of appeals correctly concluded (Pet. App. A 11a-12a, citation omitted):

> On any view of the colloquy [concerning the declaration of a mistrial] at least one defendant had asked for a mistrial; where no evidence has been presented and no delay will ensue, we do not think a trial judge must take one horn or the other of the dilemma of refusing to recognize what he considers a valid claim of prejudice * * * in order to forfend a successful claim of double jeopardy. * * * It is immaterial that, in the exercise of appellate hindsight, we may not regard the prejudice as so great or so incurable by less drastic means.

For these reasons, as well as those additionally discussed by the court of appeals (Pet. App. A 2a-12a), petitioner LaPonzina's contention that his second trial and ultimate conviction were barred by the Double Jeopardy Clause was properly rejected.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[6]A different case might perhaps have been presented had petitioner LaPonzina affirmatively objected to the declaration of a mistrial rather than having merely formally withheld his consent. When a defendant seeks to have his case submitted to the jury then impanelled, he asserts one of the interests the Double Jeopardy Clause was designed to protect. See *United States* v. *Dinitz*, No. 74-928, decided March 8, 1976, and cases cited therein. As already noted, however, LaPonzina asserted no such interest in the present case. Instead, he actively sought the termination of his first trial and then ultimately withheld his consent to that course in an obvious effort to permit him subsequently to object to a retrial on double jeopardy grounds. In such circumstances, it cannot reasonably be said that the declaration of a mistrial as to LaPonzina materially impaired those legitimate interests protected by the Double Jeopardy Clause.